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IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHNNY JAY DIAMOND,)	
)	No. 43336
Petitioner-Appellant,)	
)	Twin Falls Co. Case No.
v.)	CV-2015-444
)	
STATE OF IDAHO,)	
)	
Defendant-Respondent.)	
_____)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF TWIN FALLS**

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STATEMENT OF THE CASE

Nature of the Case

Johnny Jay Diamond appeals from the district court's order summarily dismissing his amended post-conviction petition.

Statement of Facts and Course of Proceedings

Diamond pled guilty to Aiding and Abetting Robbery. (R., p. 147.) The district court placed Diamond on probation. (Id.) Diamond appealed, and his sentence was affirmed on appeal. (Id.) Diamond violated his probation and the district court revoked his probation and sent Diamond on a rider program. (Id.) Following the rider program, the district court again placed Diamond on probation. (Id.) The district court later revoked probation and placed Diamond on a ten-year period of unsupervised probation. (Id.) Diamond again violated probation. (R., p. 148.) The district court revoked Diamond's probation and executed a reduced sentence. (Id.) Diamond then filed a Rule 35 motion, which was denied. (Id.)

Diamond filed a Petition and Affidavit for Post Conviction Relief. (R., pp. 11-33.) Diamond alleged that his continued incarceration violated the Eighth Amendment. (R., p. 14.) Diamond also claimed that his attorney was ineffective for failing to object to the revocation of his probation. (R., pp. 18-19.)

The district court issued a pre-trial order requiring Diamond to file an Amended Petition within 28 days and setting out the requirements for the Amended Petition. (R., pp. 44-45.)

The Amended Application *must*: 1) fully comply with the required format of I.C.R. 57(a); 2) *specifically* set forth the grounds upon which the application is based, and 3) *clearly* state the relief desired as required by Idaho Code §19-4903. The purpose of this order is to expedite “the disposition of the action” pursuant to Rule 16(a)(1) and to improve the quality of the proceedings through “more thorough preparation” pursuant to Rule 16(a)(4). The amended application shall, in all respects, comply with Idaho Code § 19-4903.

(R., pp. 44-45 (emphasis in original, footnote omitted).)

Diamond filed an Amended Post Conviction Petition. (R., pp. 54-57.) The Amended Petition stated there was an appeal from the original judgment of conviction or imposition of sentence. (R., p. 55.) The Amended Petition alleged that Diamond had a potential defense to his final probation violation that was not presented by his trial counsel:

9. The facts upon which the Petitioner seeks relief are as follows:

The basis for the last Motion to Revoke Probation was on the Petitioner’s failure to pay fines, fees and restitution. However, the Petitioner had no ability to make such payments. Petitioner received advice from his prior counsel that he should admit to the probation violation and Petitioner was not advised that a defense to the probation violation would be an inability to pay. As such, the Petitioner was denied effective assistance counsel and denied due process. Had Petitioner been advised that he had a defense to the probation violation he would have insisted on an evidentiary hearing, would have prevailed and would not have been committed.

(R., pp. 55-56.) Diamond’s Amended Petition sought “to have the Order of Commitment vacated and to be placed back on probation.” (R., p. 56.) The Amended Petition included a paragraph incorporating “his original Petition and Affidavit for Post Conviction Relief as if fully set forth herein.” (R., p. 56.) The state answered. (R., pp. 58-61.)

The state objected to Diamond's attempt to incorporate the original Petition and Affidavit into the Amended Petition. (R., pp. 59-60.) The state also requested the district court take judicial notice of certain documents from the underlying criminal case. (R., pp. 62-146.)

The district court entered a Notice of Intent to Dismiss Petition for Post-Conviction Relief. (R., pp. 147-153.) The district court explained that it had required Diamond to file an Amended Petition and that the Amended Petition contained one claim of ineffective assistance of counsel. (R., p. 148.)

Diamond's Amended Petition makes one claim: that he was never advised that inability to pay was a defense to a probation violation for failure to pay restitution. Thus, he claims that he was denied effective assistance of counsel.

(R., p. 148.) The court gave notice it intended to dismiss Diamond's ineffective assistance of counsel claim because the claim was "bare, conclusory, and contradicted by the record." (R., p. 148.)

Diamond responded to the district court's Notice of Intent to Dismiss. (R., pp. 154-157.) Diamond argued that he had presented enough evidence to warrant an evidentiary hearing to show he had a defense to the probation violation that was not presented by his trial counsel. (R., pp. 154-155.) Diamond argued:

The facts set forth by the Petitioner and the transcript in the record clearly show that Petitioner has an argument regarding his ability to meet his financial obligations. That was the only alleged probation violation. To this issue he should have an evidentiary hearing.

(R., p. 155.) Diamond further explained:

Stating that the Petitioner could not meet the financial obligations and that Petitioner was denied a defense due to improper advice, coupled with the belief that the outcome would have been different, is the best Petitioner can do when the hearing wasn't even held. This is enough to raise a genuine issue of material fact. These claims are supported by the record, the reporter's transcript and Petitioner's Verified Petition.

(R., p. 156.) Diamond's response did not challenge the district court's conclusion that Diamond's Amended Petition only contained one claim. (See R., pp. 154-157.) Nor did Diamond's response assert there were more claims contained within the Amended Petition. (See Id.)

The district court considered Diamond's response but dismissed his Amended Petition because the response "failed to remediate the deficiencies pointed out in the court's Notice of Intent[.]" (R., p. 160.) The district court explained:

[Diamond's] response contains no new evidence, by affidavit or otherwise. Instead, it argues that the Amended Petition did raise genuine issues of material fact regarding the failure of the Petitioner's prior counsel to advise him to raise the defense of inability to meet his financial obligations. The response goes on to argue that had the Petitioner raised this defense instead of admitting to a probation violation, he would not have been found in violation and his probation would not have been revoked.

This argument conflates a finding of a probation violation with a finding that the violation was willful. Idaho's appellate courts have held that these are separate determinations. *See State v. Leach*, 135 Idaho 525, 529, 20 P.3d 709, 713 (Ct. App. 2001) (holding that a trial court must first decide whether a condition of probation was actually violated – a question of fact – followed by a determination regarding whether or not the violation justifies revoking probation-a matter of discretion). Only once the court determines that the probationer has in fact violated the terms of his or her probation may the court then make the separate inquiry into whether that violation was willful or non-willful. *State v. Sanchez*, 149 Idaho 102, 106, 233 P.3d 33, 37 (2009).

Here, the Petitioner faced a probation violation for failing to pay his court ordered financial obligations. He admitted to this violation and then proceeded to disposition, wherein the court determined, after the Petitioner's counsel and the Petitioner himself presented considerable evidence as to his inability to pay, that the violation was indeed willful. Therefore, the Petitioner did present the defense of inability to pay at the proper time in the probation violation proceedings.

(R., pp. 158-159.) The district court entered judgment. (R., pp. 162-163.)

Diamond timely appealed. (R., pp. 164-166.)

ISSUE

Diamond states the issue on appeal as:

Did the district court err by summarily dismissing Mr. Diamond's amended petition for post-conviction relief because the court did not address the issues raised in the initial petition?

(Appellant's brief, p. 3.)

The state rephrases the issue as:

Has Diamond failed to show the district court erred when it summarily dismissed Diamond's amended petition for post-conviction relief after Diamond was given adequate notice?

ARGUMENT

The District Court's Notice Of Intent To Dismiss Addressed The Only Claim Raised By Diamond's Amended Petition

A. Introduction

Diamond argues that the district court's Notice of Intent to Dismiss did not address two claims in his initial petition which were allegedly incorporated into Diamond's Amended Petition. (See Appellant's brief, p. 4.) Specifically, Diamond argues that the Notice of Intent to Dismiss did not address his claim that his criminal attorney was ineffective for failing to file an appeal and did not address his claim that he was incarcerated beyond his release date in violation of the Eighth Amendment. (See Appellant's brief, p. 6.)

Diamond is correct that the district court dismissed his Amended Petition without specifically addressing these claims. Contrary to Diamond's assertions, however, the district court did not err by doing so because the Amended Petition did not incorporate these two claims. The Amended Petition specifically stated that Diamond's counsel had filed an appeal. (R., p. 55.) The Amended Petition also sought to have Diamond placed back on probation. (R., p. 56.) If Diamond were raising a claim that he was incarcerated past his release date, as he had in his initial petition, the Amended Petition would not have sought to have him placed back on probation.

Additionally, Diamond's response to the district court's Notice of Intent to Dismiss did not reference these additional claims, nor did Diamond's response challenge the district court's notice that Diamond was only raising one claim in post-conviction. (See R., pp. 154-157.) The district court gave adequate notice

that it was going to dismiss Diamond's one claim and on appeal Diamond has failed to show the district court erred.

B. Standard Of Review

In reviewing the summary dismissal of a post-conviction application, the appellate court reviews the record to determine if a genuine issue of material fact exists which, if resolved in petitioner's favor, would require relief to be granted. Nellsch v. State, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992). The court freely reviews the district court's application of the law. Id. at 434, 835 P.2d at 669. The court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001).

C. The District Court Correctly Summarily Dismissed Diamond's Amended Post-Conviction Petition After Giving Diamond Adequate Notice Of The Basis For Dismissal Of The Only Claim In The Amended Petition

Diamond argues that the district court's Notice of Intent to Dismiss did not address the claims he raised in his initial petition, and incorporated into his Amended Petition, and thus the case should be remanded for consideration of the unaddressed claims. (Appellant's brief, pp. 6-7.) Diamond is incorrect. The district court's Notice of Intent to Dismiss gave proper notice on the one claim asserted by Diamond before the district court.

"Idaho Code § 19-4906 permits a court to rule summarily on applications for post-conviction relief." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007). "A court may grant the motion of either party under I.C. § 19-

4906(c), or may dismiss the application sua sponte under I.C. § 19-4906(b).” Id. Summary disposition of a post-conviction petition “is appropriate if the applicant’s evidence raises no genuine issue of material fact.” Id. at 522, 164 P.3d at 802 (citing I.C. § 19-4906(b), (c)). “When the court considering the petition for post-conviction relief is contemplating dismissal sua sponte, it must notify the parties of its intention to dismiss and must provide its reasons for the potential dismissal.” Banks v. State, 123 Idaho 953, 954, 855 P.2d 38, 39 (1993) (citations omitted); see also I.C. § 19-4906(b). The purpose of the notice requirement of I.C. § 19-4906(b) is to give the petitioner the opportunity to provide further legal authority or evidence to establish a genuine issue of material fact. Fetterly v. State, 121 Idaho 417, 418, 825 P.2d 1073, 1074 (1991); State v. Christensen, 102 Idaho 487, 489, 632 P.2d 676, 678 (1981).

On appeal, Diamond argues that his Amended Petition incorporated two claims that were alleged in his initial petition. (Appellant’s brief, p. 6.) First, “Mr. Diamond asserted that he requested that his attorney file an appeal but he ‘never heard any further about it’ and was time barred.” (Appellant’s brief, p. 6 (citing R., p. 12).) Second, Diamond “asserted that he had been incarcerated beyond his release date” which “Mr. Diamond alleged...was a violation of the Eighth Amendment.” (Appellant’s brief, p. 6 (citing R., pp.13-14).)

First, Diamond’s appellate argument, that his Amended Petition raised a claim relating to his counsel’s failure to file an appeal, is not supported by the record. While Diamond’s initial petition did state that his criminal counsel did not file an appeal, neither his initial nor his amended petition ever alleged any facts

or made an ineffective assistance of counsel claim related to failing to file an appeal. (See R., pp. 11-33, pp. 54-57.) Moreover, the Amended Petition asserted there actually was an appeal from the judgment of conviction or imposition of sentence. (R., p. 55.)

6. Was there an appeal from the judgment of conviction or imposition of sentence?

☒ Yes ☐ No

(R., p. 55.) This is also supported by the district court's Notice of Intent to Dismiss, which stated "Diamond then appealed and his sentence was affirmed." (R., p. 147.) Diamond's response to the district court's Notice of Intent to Dismiss did not challenge this statement. (See R., pp. 154-156.) Contrary to Diamond's argument on appeal, neither his initial petition nor amended petition raised a claim regarding his trial counsel's alleged failure to file an appeal.

Second, Diamond argues that his Amended Petition incorporated the claim, alleged in his initial petition, "that he had been incarcerated beyond his release date" which "Mr. Diamond alleged...was a violation of the Eighth Amendment." (Appellant's brief, p. 6 (citing R., pp.13-14).) Diamond now argues that the district court's Notice of Intent to Dismiss did not address this "claim." (R., pp. 5-6.) The initial petition is not clear whether this is a separate claim or part of an ineffective assistance of counsel claim, or vice versa. (See R., pp. 11-23.) Regardless, to the extent this was a separate Eighth Amendment claim, Diamond's Amended Petition eliminated it. The Amended Petition listed the specific grounds on which relief was sought, and the Eighth Amendment was not listed. (See R., p. 55.) Nor was this allegation included in the "facts upon

which the Petitioner seeks relief[.]” (Id.) The relief sought by the Amended Petition was to “have the Order of Commitment vacated and to be placed back on probation.” (R., p. 56.) If Diamond’s claim was that he was being held past his sentence release date—he could not be seeking relief to be placed back on probation.

The Amended Petition raised one claim – i.e., that Diamond’s counsel was ineffective in relation to the revocation of Diamond’s probation. (See R., pp. 54-57.) The Notice of Intent to Dismiss states that Diamond’s amended petition raises “one claim” (R., p. 148) and Diamond’s response to the notice did not challenge or refute that statement. (R., pp. 154-157.) Therefore, Diamond cannot now on appeal claim the district court erred by not making findings regarding his other “claims.” See I.R.C.P. 52(b) (A party may not assign error regarding a lack of specific findings unless that party raised that issue before the district court.). Diamond’s argument on appeal, that the district court’s Notice of Intent to Dismiss failed to address all of Diamond’s claims, is without support.

CONCLUSION

The state respectfully requests this Court affirm the judgment of the district court.

DATED this 31st day of March, 2016.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 31st day of March, 2016, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

JUSTIN M. CURTIS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

TST/dd